No. 71-47

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

JAMES C. WORTH, PETITIONER

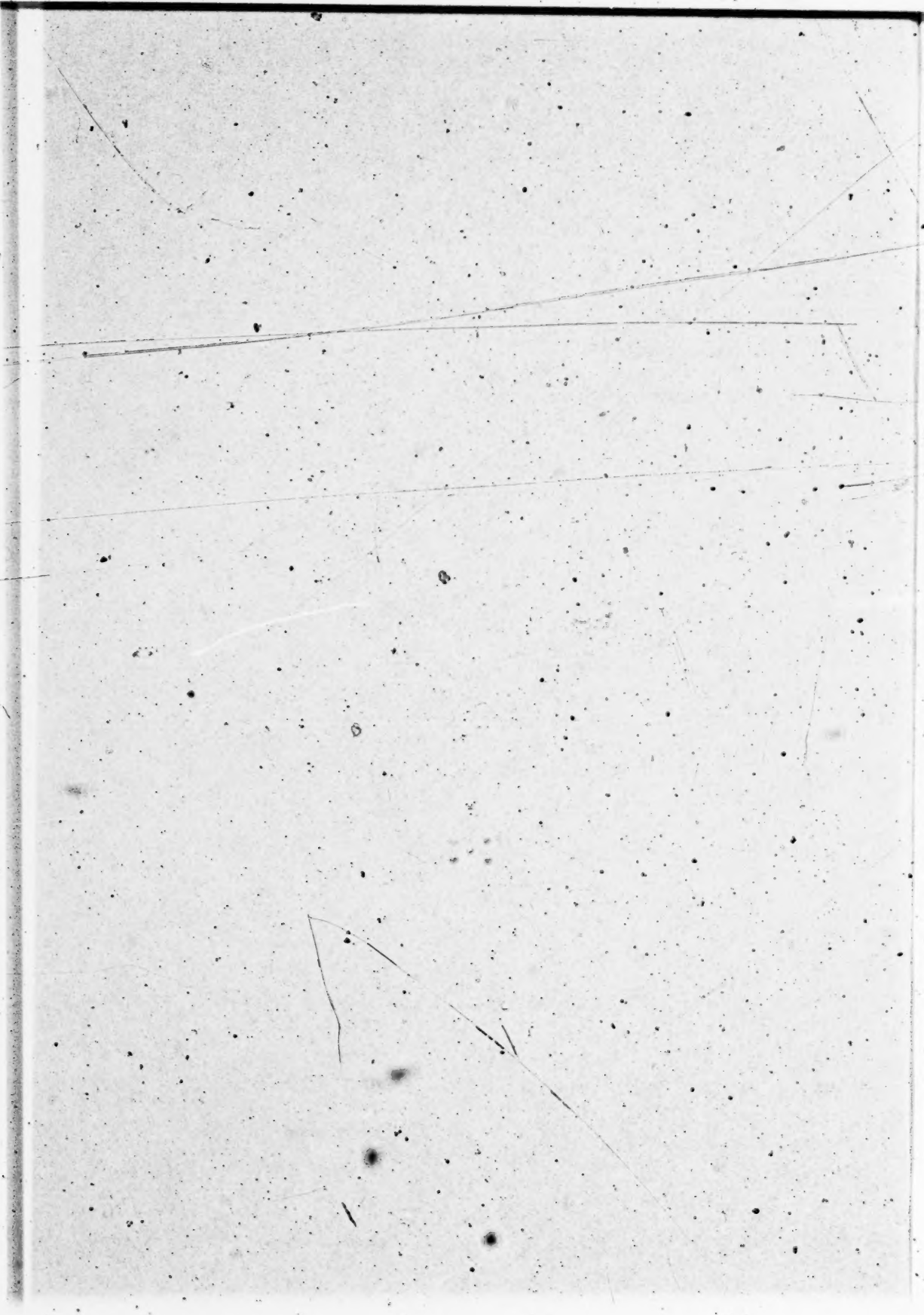
v.

UNITED STATES OF AMERICA

APPLICATION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Battle Creek, Michigan 49014



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Now comes JAMES C. WORTH, Petitioner, by counsel named below, and respectfully submits the following as his application for rehearing on his petition for writ of certiorari heretofore filed, which said petition was denied by order of this Court on October 12, 1971.

ARGUMENT

This application is primarily submitted because of the arguments made by Respondent to the effect that the writ should not be granted without a showing that the prosecuting authority had affirmative knowledge of the intention of

witness Green to claim the Fifth Amendment privilege as to all questions other than her identify.

The Reply Brief heretofore filed by Petitioner was submitted to this Court on or about September 16, 1971, some 30 days subsequent to distribution of the original petition and the brief of the United States in opposition to the members of this Court, and counsel is not aware as to whether the cases cited and arguments made therein were considered in arriving at the conclusion that the petition should be denied. It is on the assumption that these arguments were not considered, and especially that the affidavits appended proving such affirmative knowledge were not reviewed, that this application and certificate are made.

It is the position of Petitioner that circumstances did in this cause intervene of substantial effect, in that subsequent to the filing of the original petition, and long subsequent to the filing of the brief with the United States Court of Appeals, present counsel first became aware of the fact that the United States

Attorney trying the cause had been expressly advised that witness Green would not in fact testify, so that it could be proven affirmatively rather than by inference that the sole purpose of calling this witness was to induce a claim of the Fifth Amendment privilege in the presence of the jury. The entire discussion of this facet of the case by the Solicitor General was keyed to the theory that there was no way in which the United States Attorney could have learned that she would not testify other than calling her to the witness stand, and the affirmative statement of fact made, unsupported by the record, that no notice was given Government counsel that she would refuse to testify. Cf. Brief in Opposition, p. 5; United States v McKuin, 434 F. 2d 391.

In the instant case, it is submitted that there are substantial issues presented which involve the Sixth Amendment rights of representation by counsel, and the due process right to be tried fairly with the prosecuting authority limiting the evidence offered to that designed to

ultimately find the truth rather than to prejudice the jury by requiring the privilege claim in such circumstances as to create the inference that if the witness was guilty, the defendant must necessarily be guilty also. Cf. affidavits submitted as an appendix to the Reply Brief, pp. 10-12; United States v Tucker, 267 F. 2d 212 (U.S.C.A. 3d, 1959); Namet v United States, 373 U.S. 179, 10 L. Ed. 2d 278, 83 S. Ct. 1151 (1963).

WHEREFORE, Petitioner prays that a rehearing be granted on his petition for writ of certiorari, and that upon such rehearing, said writ be issued, and further that the mandate of this Court be stayed pending determination on this application.

Respectfully submitted,

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ALLEN, WORTH, HATCH & CALDERONE

By _____
of Counsel
1009 Security Bank Building
Battle Creek, Michigan 49014

Dated: November 4, 1971.

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the foregoing application for rehearing is presented in good faith and not for delay, and that this application is restricted to the intervening circumstances felt to be of controlling effect, the same being the proof of the actual knowledge of the prosecuting authority of the intent of the witness called.

Charles A. Robison

CHARLES A. ROBISON